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Supreme Court of the United States

OCTOBER TERM, 1949

No. 485

ROSE W. SHAIN,

Petitioner,

—v.—

MARK SHAIN,

Respondent.

PETITIONER'S REPLY BRIEF

ARCHIBALD PALMER,
Attorney for Petitioner.

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The respondent, in his brief, argues that the petition for a writ of certiorari was not brought by the petitioner within the ninety day period as provided for in Section 237 of the United States Code, as amended, Title 18, Section 2101 (c). The respondent contends that in the instant case the ninety day period started on the 16th day of September, 1949 and not on the 19th day of September. The petitioner contends that the ninety day period started on the 19th day of September, 1949 because of the fact that the judgment was entered on the 19th day of September, 1949, as appears from the docket (new record page 57). The respondent's contention is based on a misconstruction of the law, as will be shown by an analysis of the cases cited by the respondent.

The respondent cites, on page 8 of this brief, six cases in support of his contention, as follows:

Gorman v. *Washington University,* 316 U. S. 98, 101.

Said case has no application whatsoever to the instant case since the only issue involved in that case was whether the judgment, the review of which was sought by a writ of certiorari, was a judgment of the highest court of the state from which such review could be had. This issue is not involved in the instant case.

In the following cases:

Monks v. *Lee,* 317 U. S. 590;
Bunn v. *Atlanta,* 317 U. S. 666;
Matton Steamboat Co. Inc. v. *Murphy,* 319 U. S. 412.

it is true that this Honorable Court dismissed the petition for a writ of certiorari or appeal in those cases upon the ground that the applications were not timely. However, the facts as reported in those cases do not show that the issue involved in the instant case was involved in those cases with respect to such untimely filing.

The only issue in the case of

Department of Banking of Nebraska v. *Pink,* 317 U. S. 264, 268.

another case cited by the respondent, was whether a timely petition for rehearing tolls the running of the three month period within which a petition for a writ of certiorari may be filed. Such issue is foreign to the issue involved in the instant case with respect to the timely filing.

The sole case cited by the respondent which has any bearing on the issue of timely filing as presented in the case at bar is *Cole* v. *Violette,* 319 U. S. 581, 582. However, a study of the facts in the *Cole* case, *supra,* will show that the facts in that case were different than those involved

in the instant case and had the facts been the same as those in the instant case the decision would have been otherwise.

In the *Cole* case, *supra,* the decree of the Supreme Judicial Court was dated the 4th day of December, 1942 and the rescript was filed in the Supreme Court on the same day. The Superior Court, however, did not enter *its own decree* until the 7th day of January, 1943; the application for appeal was made on the 6th day of March, 1943. The petitioner in the *Cole* case, *supra,* took the position that the time for the appeal started to run on the 7th day of January, 1943, on which day the Superior Court entered its own decree on the mandate. This Honorable Court held that the time to take an appeal did not run from the 7th day of January, 1943, the date of the entry of the judgment by the Superior Court, but from the 4th day of December, 1942, the date of the judgment of the Supreme Judicial Court, on which day a rescript was also filed in the Superior Court. The date of such filing, in the *Cole* case, *supra,* is analogous to the date of the filing of the rescript in the Probate Court in the instant case, to wit, the 19th day of September, 1949.

In the instant case it is not contended that the period of ninety days starts to run from the date of the entry of the decree of the Probate Court entered on the mandate. It appears from the docket of the Probate Court (new record page 57) that no such decree was ever entered by the Probate Court. The date of September 16th, 1949, nowhere appears in the docket; the only date which appears is September 19th, 1949, on which the rescript from the Supreme Judicial Court was filed, and said date, to wit, September 19th, 1949, also appears as the date that the decree of the Supreme Judicial Court was entered in the docket.

There is no question that the decree referred to in the last entry of the docket, to wit, under date September 19th, 1949 (new record page 57) is a decree of the Supreme Judicial Court. This is conceded by the respondent at page 7 of his brief.

Insofar as the brief of the respondent bears upon the merits of the petition, the writer is of the opinion that the facts and law as set forth in the petitioner's main brief cover the argument advanced by the respondent and, for the purpose of brevity, will not be repeated.

Respectfully submitted,

ARCHIBALD PALMER,
Attorney for Petitioner.